

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

**SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 500**

Petitioner,

And

GOUCHER COLLEGE,

Employer.

Case No.: 05-RC-139478

EMPLOYER’S POST-HEARING BRIEF

The Employer in the above-referenced case, Goucher College (“Goucher”), through its undersigned attorneys, submits this Post-Hearing Brief in support of its challenges and in response to the challenges raised by Service Employees International Union, Local 500 (“the Union”).

I. INTRODUCTION

During the tally of ballots held on December 9, 2014, Goucher and the Union challenged a total of twelve ballots. Goucher raised nine of the challenges, which are discussed in Section II below. Goucher subsequently withdrew two of those challenges. *See* Tr. at 11-12. The voters Goucher has challenged are ineligible to vote, because they are temporary or substitute faculty with finite employment end dates and have no expectation of continued employment. They all were hired on a temporary basis at the beginning of the 2014-2015 academic year with the knowledge that they would be teaching for a finite period of time, with no expectation of renewal beyond that period. With one exception, Fairbairn, none of those individuals will be teaching at

Goucher in the 2015-16 academic year. Two of the challenged voters, Prince and Ozdemir, were engaged only for the fall semester 2014 and were terminated at the end of the term in December 2014, soon after the expiration of the voting period in this case. None of the employees whom Goucher challenged had ever been employed at the College before the fall 2014 semester. The status of each of the employees whom Goucher challenged is substantially different than other non-tenure and non-tenure-track faculty, whom Goucher employs with the expectation that they will continue teaching year after year, and it represents that status to those employees at the time of hire and in each annual contract.

The Union challenged the ballots of three non-tenure-track faculty members whose contracts will be renewed in subsequent years; two of these individuals are faculty members who gave up tenured status at the college when they retired, but continue to teach on a year-to-year basis. The third is a long-time employee of the college (Roswell) who teaches full-time, and was on special paid leave during the 2014 calendar year, but was active in teaching and other duties in the fall at the time of the election. She will teach credit courses in January 2015. These individuals share a substantial community of interest with other adjunct faculty who expect that their employment will continue from year to year.

At the hearing, Goucher introduced evidence as to each of its challenges and the Union's challenges. The Union called only one challenged voter, Briggs, and it did not call any witness to support its challenges.

II. FACTS REGARDING EMPLOYER CHALLENGES

A. Joseph Briggs

Goucher hired visiting faculty Joseph Briggs as a temporary replacement faculty member to teach the Chemistry 112 course for the fall 2014 semester as a substitute for Professor Scott

Sibley, who was teaching fewer courses for the semester due to his temporary service as faculty chair. *See* Tr. at 55. Briggs was not employed by Goucher prior to that date. *See* Tr. at 62.

Briggs' appointment letter for this limited engagement states that the offer is contingent on class enrollment as well as the unavailability of a professor to teach the course. Empl. Exh. 7, p. 3. It also is silent on the possibility of contract renewal, because the appointment was of finite, limited duration. *Id.* Provost Marc Roy interviewed Briggs for a temporary one-semester replacement position. Briggs unquestionably understood that his employment with Goucher was for only one semester. *See* Tr. at 55. Roy confirmed that the college does not have plans to employ Briggs beyond the spring semester of 2015. *See* Tr. at 55.

On December 9, 2014, Goucher offered Briggs a second temporary, visiting faculty appointment for the spring 2015 semester only. He will be teaching the Chemistry 152 course in the absence of Professor Kevin Schulz, who is on sabbatical leave. *See* Tr. at 55. Like his first appointment letter, his second letter makes clear that the engagement is contingent upon course enrollment and the unavailability of a professor to teach the course. Empl. Exh. 7, p. 1. It also is silent regarding the possibility of contract renewal. *Id.* The Union called Briggs to testify, and he admitted on cross-examination that he had had no conversations with Goucher about teaching beyond spring 2015, that he has not discussed employment in the future with the chairs of the Chemistry and Biology departments, and that he will not be employed at Goucher in the fall of 2015. *See* Tr. at 145, 149, 150. The Faculty Appointment Authorization form completed by the chemistry department indicates that Briggs was being employed as a leave replacement for the spring 2015 semester. Empl. Exh. 7, page 2.¹

¹ Employer's Exhibit 7, page 2 is an example of a "Part-Time Faculty Appointment Authorization form," which is completed by a department chair when the department seeks to hire a part-time faculty member. *See* Tr. at 58. It provides space to indicate whether the faculty member being hired is, or is not, being hired as a leave replacement.

Each of the two times Briggs has been engaged, his appointment was as a replacement, and with a specific end date. Each of the two semesters, the full time faculty member whom he replaced has returned or will be returning to teach the class in the next semester. There is uncontradicted evidence that both Briggs and Goucher knew at the inception of employment that it was for a temporary period, that it would be ending, and when it would be ending.

B. Jeffrey Dowd

Jeffrey Dowd is a visiting professor in the Sociology and Anthropology Department for the 2014-2015 academic year only; he did not teach at Goucher prior to the current academic year. *See* Tr. 38-39. His department chair, Professor Jamie Mullaney, testified that he was hired to teach courses that were taught by a tenured faculty member who was on a one-year sabbatical, Professor Raj Goshal. *See* Tr. at 20; Empl. Ex. 2. Because Goshal is returning in fall 2015 (*see* Tr. at 62), Dowd will not be returning to the college in fall 2015. *See* Tr. at 35.

At the time Dowd was hired, another member of the department, Professor Janet Shope, was teaching fewer courses in the department because she was also serving in an administrative capacity at the college. *See* Tr. 32-33; Empl. Ex. 2. Shope teaches different courses than Goshal. Dowd inquired as to the possibility of continuing on to teach Shope's courses in the 2015-2016 academic year, but was told that he was not qualified to teach Shope's courses. *See* Tr. 20-21.

Dowd's appointment letter, an e-mail from Roy confirming the offer, the Payroll Authorization form² for the position, and the candidate offer form all indicate that he is being offered an appointment as visiting professor for one year, with the possibility of renewal for a

² Roy testified that after he makes a verbal offer to a full-time candidate, he completes a "candidate offer form," which provides space to indicate the nature of the appointment – in this case – as "FT one-year leave replacement." *See* Tr. at 53; Empl. Ex. 5. After completing the form, the Roy gives the form to his assistant, who completes the Payroll Authorization Form (Empl. Ex. 4), which is then provided to Human Resources. *See* Tr. at 52.

second year. Pet. Ex. 1; Tr. at 54; Empl. Ex. 5, Empl. Ex. 6. The Payroll Authorization form describes Dowd as having the responsibility to “Teach full-time during the academic year. One-year leave replacement.”

Given that Shope will continue to serve as Associate Provost for one more year (the 2015-16 academic year) and Goshal will return in fall 2015, the College will advertise for a temporary replacement faculty to cover courses that Shope usually teaches in the area of health and medicine rather than the area of social justice, which is Dowd’s expertise. *See* Tr. at 23; 31-32. Roy testified that Dowd does not have the qualifications to teach Shope’s courses. *See* Tr. at 51. This is verified by Dowd’s *curriculum vitae*. Empl. Ex. 3.

The Union will contend that because Goucher issued Dowd a contract with the terminology “possibility of renewal,” he is in the same category as other non-tenure-track faculty who have a “reasonable expectation of continued employment” at the college. Petitioner’s Statement of Positions on Challenged Ballots, p. 5. However, it was clear from the outset and Dowd was told that he would be teaching at Goucher as a replacement for another faculty member for a finite period of time - up to a maximum of 2 years - and that he had no expectation of employment beyond that period. *See* Tr. at 105; Empl. Ex. 6. This is distinctly different from full-time non-replacement faculty who have an expectation that they will continue to teach from year to year with no indication that they are teaching as substitutes or will not teach beyond the end of the semester or academic year. Indeed, Roy testified without contradiction that most non-tenure-track full-time faculty receive appointment letters stating that they are employed for the current year with the expectation that they will be employed in the following year, in some cases, for the following two years. *See* Tr. at 101. Further, if such individuals have been teaching for more than 2 years, they must be given one-year’s notice of non-renewal. *See* Tr. 45-

46; Empl. Ex. 19, p. 24 Roy testified that replacement faculty are not entitled to such notice because “they are told from the beginning that they’re replacement faculty, and it is a term limited contract.” *See* Tr. at 47. The Union did not introduce any evidence contradicting this testimony. In any event, Dowd has been informed that he is not being renewed and that a national search will be conducted for the vacancy in the department. *See* Tr. at 32.

At the hearing, the Union called Ruquia Ahmed Schofield, a non-tenure-track faculty member in the Chemistry Department. Schofield began her employment as a “visiting professor” and has been employed for 7 years by Goucher. *See* Tr. at 134. On cross-examination, she testified that after her one year as a substitute, she was and has been engaged to teach the same rotation of courses in the Department. *See* Tr. at 137-138. She also admitted that she has not taught as a substitute since her third year. *See* Tr. at 141-142. While Goucher has continued to engage Schofield for 6 academic years with the title of “visiting professor,” her situation is totally different from that of Dowd (also a “visiting professor”) who has a one-year contract with no possibility of reemployment. Roy clarified that “most commonly” the title “visiting professor” is someone who is hired for a limited term with a definitive end, but that the term is sometimes used for adjunct faculty who are continuing. *See* Tr. at 43. The fact that Schofield’s title is the same as that of Dowd does not change Dowd’s status as temporary employee who lacks a community of interest with other adjuncts who, like Schofield, have a continuing expectation of employment and are engaged to teach the same or a rotation of courses from year to year.

C. Madeleine Fairbairn

Madeleine Fairbairn is a postdoctoral fellow and is supported by a grant that funds the position for a maximum of two years. Empl. Ex. 8; Tr. at 63. This two-year period is not a

guarantee, but is contingent on grant funding being available in the second year, as Fairbairn was informed in an email from Roy. Empl. Ex. 8, pp. 1-2. Fairbairn's appointment letter, like Dowd's, makes clear that there is a possibility of renewal, but only for a second year. Empl. Ex. 8, p.4. Roy informed her of this arrangement. *See* Tr. at 63-64. Finally, the Faculty Payroll Authorization form and Candidate Offer Form clearly identify her as a post-doctoral fellow with a one-year appointment. Empl. Ex. 8, p. 5; Ex. 9; *see* Tr. at 67. Roy also testified that to the best of his knowledge no faculty member who has been hired pursuant to a grant has been subsequently hired by the college. *See* Tr. at 109-110. Fairbairn's employment will terminate at the end of the 2015-16 academic year. *See* Tr. at 64. The Union did not introduce any evidence as to this challenge.

D. Daniel Kimball

On April 3, 2014, Goucher offered and Professor Daniel Kimball accepted an appointment as a full-time, non-tenure-track faculty in the Department of Communication and Media Studies. Prior to his employment, Goucher told Kimball that the position he held would be discontinued after the academic year. Kimball accepted the position knowing that condition. *See* Tr. at 70. The Department is converting the position into a tenure-track position for the 2015-16 academic year. This conversion is documented in the department's request to the Provost for the position. Empl. Ex. 16; *see* Tr. at 87. Kimball's letter does not state that there is a possibility of contract renewal. Empl. Ex. 10. Roy interviewed Kimball before making him the temporary appointment offer, and notified Kimball that the non-tenure-track position which he was being offered was being eliminated. *See* Tr. at 69-70. That conversion was approved and a national search recently began. *See* Tr. at 87-88.

Kimball has applied for the tenure track position. *See* Tr. at 70. If selected, he will be employed in a classification that is specifically excluded from the bargaining unit, pursuant to the Parties' Stipulated Election Agreement. In any event, the non-tenure-track position in which Kimball served when the election was held will no longer be in existence after the current academic year, and its elimination was a foregone conclusion at the inception of his employment. Like the Employer's other challenged voters, Kimball knew at the beginning of his employment that he was being engaged as a non-tenure-track faculty for a limited period of time and that his employment in that capacity would be ending.

E. Sinan Ozdemir

Goucher employed³ Professor Sinan Ozdemir to fill a one-semester leave replacement position for Jill Zimmerman, the Chair of the Mathematics and Computer Science Department, who was on sabbatical leave. *See* Tr. at 72-73. Ozdemir's appointment letter makes clear that the engagement is contingent upon course enrollment and the unavailability of a professor to teach the course. Empl. Ex. 11. Additionally, the letter is silent on the possibility of contract renewal. Roy testified without contradiction that Goucher informed Ozdemir at the inception of this temporary appointment that that he was serving as a temporary replacement for Zimmerman for the fall semester only. *See* Tr. at 72. This is confirmed by the Faculty Appointment Authorization form (Emp. Ex. 11, p.3), which indicates that Ozdemir's position was as a replacement for Zimmerman. Ozdemir is no longer employed by the College. *See* Tr. at 73.

³ Goucher has also employed Sinan Ozdemir as an adjunct faculty member in Goucher's off-campus Prison Education Program ("GPEP") located in Jessup, Maryland. *See* Tr. at 73-74. The Parties' Stipulated Election Agreement excludes the GPEP program because that program is not located on the campus. Ozdemir was not eligible to vote as faculty member of the GPEP program.

F. Michelle Prince

Goucher employed Professor Michelle Prince on a finite temporary basis as a visiting faculty to replace Professor Mel Lewis while Lewis was on leave for the fall semester. *See* Tr. at 76; Empl. Ex. 13. In early 2014, the department chair, Jeanie Murphy, Chair of the Women, Gender and Sexuality (“WGS”) Program at Goucher, extended an offer to Prince to teach two WGS courses, Women’s Studies 250 and Women’s Studies 100, during the fall 2014 semester only, while Lewis was on leave. Empl. Ex. 14. On July 1, 2014, an appointment letter was sent to Prince. Empl. Ex. 12. The letter, like the others, states that the appointment is contingent on enrollment and the unavailability of a professor to teach the courses. It also does not state that there is a possibility of contract renewal. It is uncontradicted that Prince knew at the outset of her employment that she would be teaching at Goucher only for one semester, and only as a temporary fill-in for a professor on leave. Roy’s internal documentation also reflects that this is the case, specifically the Part-Time Faculty Authorization Form (Empl. Ex., p. 2), which indicates that Prince was a leave replacement for Mel Lewis. Consistent with the terms of her specific term engagement, Prince is no longer employed by Goucher. *See* Tr. at 76.

G. Jay Thompson

Goucher employed Professor Jay Thompson as a visiting professor on a temporary basis to teach the Business 206 course during the fall 2014 semester. *See* Tr. at 81. Thompson’s July 1, 2014, appointment letter for this limited engagement states that the offer is contingent on class enrollment as well as the unavailability of a professor to teach the course. Empl. Ex. 15, p. 1. It also is silent on the possibility of contract renewal, because the appointment was of finite, limited duration. After the semester, this course will in the future be taught by a full-time instructor, Phaye Poliakoff Chen; this was communicated to Thompson. *See* Tr. at 82; 121-122.

On December 9, 2014, Goucher offered Thompson a second temporary, visiting faculty appointment for the spring 2015 semester teaching the English 105 course. Empl. Ex. 15, p. 3. Like his first appointment letter, his second letter makes clear that the engagement is contingent upon course enrollment and the unavailability of a professor to teach the course. As described by Poliakoff-Chen, the new director of the writing program, that program is being reorganized beginning with the 2015-16 academic year. As described in the Writing Program proposal, which will be implemented in fall 2015, only full-time and half-time faculty will be used. Empl. Ex. 20 (staffing plans are described on the last page); *see* Tr. at 83; 125-126. This planned reorganization and the decision to not use part-time faculty in the writing program was made in spring 2014, well before Thompson was hired to teach in the program. *See* Tr. at 131-132. Poliakoff-Chen informed Thompson of the fact that after the 2014-15 academic year, the program would no longer be using part-time instructors. *See* Tr. at 123-124. Each of the two times Thompson has been engaged, his appointment has been limited in duration; both he and Goucher knew at the inception of employment that it was for a temporary period, that it would be ending, and when it would be ending.

III. THE REGION SHOULD SUSTAIN GOUCHER’S CHALLENGES BECAUSE THESE VOTERS HELD TEMPORARY POSITIONS WITH NO POSSIBILITY OF CONTINUED EMPLOYMENT

In analyzing whether a purportedly temporary employee lacks a community of interest with employees voting in a bargaining unit, the Board “examines whether or not the employee’s tenure is finite and its end is reasonably ascertainable, either by reference to a calendar date, or the completion of a specific job or event...” *Marian Medical Center*, 339 NLRB 127, 128 (2003) (challenged voter lacked community of interest where he was assigned to work at voting location of employer and employer planned to hire permanent employer in near future when renovation

project was complete); *Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127, 1129 (1979) (voters excluded where hired for one summer without expectancy of continued employment); *FWD Corp.*, 138 NLRB 386, 390 (1962) (voter excluded where he was 6-month temporary training assignment to unit location); *Irwin & Lyons*, 51 NLRB 1370, 1373 (1943) (employees excluded where transferred from one logging camp to another during temporary shutdown).

The Board stated in *Marian Medical Center* that where an employee is hired for “a finite, ascertainable term,” whether a date certain or tied to a future event, s/he lacks a community of interest with other employees and is ineligible to vote. 339 NLRB at 128. On the other hand, where a temporary employee is hired for an open-ended, indefinite term (as is the case with all of the remaining Goucher adjuncts), the employee “is generally more likely to be a qualified voter.” *Id.*

Briggs, Ozdemir, Prince and Dowd all are temporary replacements, filling in for professors on sabbatical or other kinds of leave. When those professors return, the temporary employment of all four of these individuals is expected to, and will, end. They have been hired for a finite, ascertainable term, and each of them were aware of this finite term at the time of hire. Their employment termination is tied to a future event: the return of the professors whom they have temporarily replaced. Indeed, Briggs, Ozdemir, Prince and Dowd’s terminations are more readily tied to a date certain than was the employee in *Marian Medical Center*, where the employee’s termination was tied to two events of uncertain duration: the completion of a renovation project and the employer interviewing for and hiring a permanent candidate.

Kimball’s employment was even more tied to a date certain: he was notified at the outset of employment that, by the end of the 2014-2015 academic year, the position he held was being eliminated and likely to be converted to a tenure track position (specifically excluded from the

unit description in the Stipulated Election Agreement). Similarly, Fairbairn's employment was tied to a future event: the expiration of the grant funding her appointment (which will last for no longer than two years). Finally, Thompson was aware, at the inception of his temporary employment that the employment was for a finite duration and would end in one year because of the restructuring of the program in which he was teaching. Under long-standing Board precedent, these challenged voters lack a community of interest with the stipulated bargaining unit, and their votes should not be counted.

The cases where the Board has included in a unit "terminal faculty" (that is, adjuncts who are on a semester-by-semester or year-by-year contract with no guarantee of renewal) are inapposite and distinguishable. For instance, in *Manhattan College*, the adjuncts all were employed on a contract basis and notified several months before expiration whether the contract would be renewed. 195 NLRB 65, 66 (1972). The employer there sought to exclude adjuncts whose contracts were not being renewed (but who, when they were hired, were not told that their employment was for a finite period). *Id.* The Board rejected this argument, noting that there was no evidence establishing that adjuncts "on 'terminal contract' were hired other than as permanent employees, subject to termination the same as any other employee in the unit." *Id.* (emphasis supplied). Thus, the adjuncts, while they remained employed, shared a community of interest with the unit and could vote. *Id.*; see also *New York University*, 205 NLRB 4 (1973) (in absence of evidence that adjuncts not hired on same terms as other adjuncts, *e.g.*, on open-ended basis, challenges rejected).

The Union did not introduce any evidence which undermines Goucher's position or its evidence as to these challenges. Goucher has sustained its burden of proof on each of these employees, and the Region should sustain the challenges to their ballots.

IV. FACTS REGARDING UNION CHALLENGES

A. Esther Gibbs

The Union challenged Esther Gibbs' ballot, contending that she should be excluded as tenured. The Union is incorrect. Gibbs formerly had tenure, but she retired effective September 1, 2014 and entered into a Phased Retirement Agreement with Goucher in which she explicitly surrendered her tenure at the college. Empl. Ex. 17; *see* Tr. at 91. As part of the Agreement, Gibbs is in a three-year period of phased retirement during which she is teaching in the Chemistry Department as a half-time adjunct. *See* Tr. at 99. Her most recent appointment letter was issued to her on September 9, 2014 (Empl. Ex. 17, p. 9), and she was teaching courses for credit in fall 2014. *See* Tr. at 154-155. The fact that Gibbs formerly was tenured has no bearing on her status at the time of the election.

The Union contends that because Gibbs retains her honorary title as "Professor" in the college's academic catalogue (Pet. Ex. 5, p. 7), she is a tenured faculty member.⁴ Petitioner's Statement of Positions on Challenged Ballots, p. 5. However, the Union is confusing Gibbs' "rank" as a professor with her status as a non-tenured faculty member; it is her status as a non-tenured faculty member that determines her eligibility under the Stipulated Election Agreement, not her rank. Although it is true that only tenure-track faculty are eligible for promotion to full professor (Pet. Ex 2, p. 25), it does not follow that full-time professors, like Gibbs, cannot surrender their tenure and again take on the status of non-tenure track faculty, which is the case here. Roy testified that tenured professors who retire and continue to teach part-time are allowed to keep their title on an honorary basis, but the title does not convey employment implications.

⁴ Goucher objected to the introduction of the Catalogue as irrelevant. In fact, the Catalogue does not delineate in any way which faculty are tenured. Therefore, it does not support the Union's position, and it is not material to these challenges.

See Tr. at 98-99. Gibbs clearly is an eligible non-tenure-track faculty member within the definition of the Agreement.

B. Carol Mills

The Union is similarly incorrect in its claim that Carol Mills is ineligible because she is tenured. Like Gibbs, Mills entered into a retirement agreement in 2007, under which she surrendered her tenure at the college effective September 1, 2008. Empl. Ex. 18; *see* Tr. at 93. In addition, Mills is teaching at Goucher on a part-time, non-tenure-track basis as a lecturer in the Psychology Department and she has been doing so consistently since her retirement in 2008, including in the fall, 2014. *See* Tr. at 98-99; 154-155. As with Gibbs, the fact that Mills had tenure several years ago and retains her honorary title as Professor Emerita of psychology (Pet. Ex. 5; Tr. at 113-114), is irrelevant to her status as an adjunct without tenure as of October 24, 2014.

C. Barbara Roswell

Finally, the Union challenged Barbara Roswell on the ground that she was not employed by Goucher on October 24, 2014. The Union is incorrect. Roswell, who began teaching at Goucher thirty years ago, was employed by Goucher as of October 24, 2014, as an instructor in the Writing Program but was temporarily out on paid special leave. *See* Tr. at 126, 130. The parties stipulated that she was on the employer payroll in the period immediately preceding the election and that in the fall 2014 she did not teach a course for credit. *See* Tr. at 152-153. Goucher's employment of Roswell is confirmed by her appointment letter for the 2014-2015 academic year, which also states that she will be teaching courses at Goucher in the spring 2015 semester. Also, Poliakoff-Chen, the director of the Writing Program, testified that Roswell engaged in numerous of her regular employment activities even though she was on leave. These

included meeting with student advisees, writing recommendations for advisees, running workshops for Goucher students teaching in the GPEP program, and assisting with reorganization of the writing program. *See* Tr. at 127-129.

The NLRB has held consistently that where an employee is on leave, the employee is eligible to vote “absent an affirmative showing that the employee has resigned or been discharged.” *Home Care Network*, 347 NLRB 859 (2006); *Red Arrow Freight Lines*, 278 NLRB 965 (1986); *Pepsi-Cola Co.*, 315 NLRB 1322 (1995). While it is true that in fall 2014 Roswell did not teach a for-credit course, the fact is that Goucher had employed Roswell on a temporary, paid leave, after which time she is returning to teach at Goucher. For that reason, the Region should open her ballot and count her vote.

V. CONCLUSION

For the foregoing reasons, the Regional Director should order that the challenges to the votes of Briggs, Fairbairn, Dowd, Ozdemir, Kimball, Prince and Thompson be upheld and their votes not counted. Further, the Regional Director should reject the challenges to the votes of Gibbs, Mills and Roswell and order that their ballots be opened and counted

Respectfully submitted this 13th day of January, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2015, a copy of the foregoing Post-Hearing Brief was e-filed with Region 5, and a copy was sent by electronic mail to the following representative of SEIU, Local 500:

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